RECORD AND BRIEFS

Nos. 16-285 & 16-307

IN THE
# Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
*Petitioner*,

v.

JACOB LEWIS,
*Respondent*.

NATIONAL LABOR RELATIONS BOARD,
*Petitioner*,

v.

MURPHY OIL USA, INC., *et al.*,
*Respondents*.

On Writs of Certiorari to the
United States Courts of Appeals for the
Fifth and Seventh Circuits

## REPLY BRIEF FOR PETITIONER EPIC SYSTEMS CORPORATION AND RESPONDENT MURPHY OIL USA, INC.

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## RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the opening brief for petitioner Epic Systems Corporation and respondent Murphy Oil USA, Inc., remains accurate.

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## REPLY BRIEF FOR PETITIONER EPIC SYSTEMS CORPORATION AND RESPONDENT MURPHY OIL USA, INC.

## INTRODUCTION

The view of the National Labor Relations Act (NLRA) advanced by the other side (hereinafter Respondents) is truly remarkable. In their view: Section 7 gives employees a right to participate in joint legal proceedings that is substantive for pur-

poses of overriding the Federal Arbitration Act (FAA), but procedural for purposes of avoiding a Rules Enabling Act problem and applicable only to proceedings that are "available" (a term not found in Section 7). Board Br. 19. Section 8, which by its terms prohibits any employer effort to interfere with or restrain a Section 7 right, nonetheless allows an employer to actively resist class certification in particular circumstances, Hobson Br. 22, and even to eliminate altogether the right in court, Board Br. 38. Finally, Respondents submit that this sometimes-substantive, sometimes-procedural, sometimes-backed-by-Section-8, sometimes-not right is sometimes nonwaivable (when it comes to the employees and agreements here, *id.* at 8) and sometimes waivable (if the waivers are limited to judicial proceedings, *id.* at 9-10; restricted to past disputes, Hobson Br. 57; or negotiated by a union, Board Br. 29-30).

No other right works this way, and it is hard to escape the conclusion that Respondents' interpretation of the NLRA has been gerrymandered to defeat the FAA and bilateral arbitration. Their shape-shifting conception of the NLRA is certainly not the *only possible* reading of the statute. Yet to prevail, Respondents must show that it is. That is because, as this Court has twice made clear, the FAA protects the right to agree to bilateral arbitration and thus unambiguously *mandates* enforcement of the class waivers here. So unless the NLRA contains a contrary congressional command—that is, a clearly expressed congressional intention to *preclude* the waivers—the Court should reconcile the two statutes by construing the NLRA in harmony with the FAA. Because Respondents' extraordinary view of the

statute is not clearly expressed in the NLRA, the class waivers should be enforced.

## ARGUMENT

### I. THE FAA AND THE NLRA SHOULD BE INTERPRETED HARMONIOUSLY TO MANDATE ENFORCING THE CLASS WAIVERS

In cases involving the interaction of two federal statutes, the Court's "duty" is to harmonize them, if at all possible. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *see also Posadas* v. *Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) ("[R]epeals by implication are not favored."). When one of the statutes speaks unambiguously, the possibility of harmonization will depend on whether the other contains a "clearly expressed congressional intention to the contrary." *Morton*, 417 U.S. at 551. If the other statute contains such a "contrary congressional command," *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012), the two statutes are irreconcilable, and the question becomes which statute should be given "priority," *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 533 (1995). But if the other statute contains no contrary congressional command, the two statutes are "capable of co-existence," and the Court should adopt a permissible construction of the second statute that reconciles it with the unambiguous mandate of the first. *Morton*, 417 U.S. at 551.

In light of the lingering hostility to arbitration, this Court has had numerous opportunities to apply these principles to the FAA and allegedly conflicting statutes, and to reconcile the conflict by applying the

clear command of the FAA. There is no reason for a different result here.

### A. Absent A Contrary Congressional Command, The NLRA Should Be Construed To Avoid Conflicting With The FAA's Unambiguous Mandate

This Court's decisions involving the FAA and other allegedly conflicting federal statutes make clear how this framework should apply. Opening Br. 14-18. The FAA speaks unambiguously, declaring arbitration provisions "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Accordingly, the FAA "requires courts to enforce agreements to arbitrate according to their terms, * * * even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit*, 565 U.S. at 98 (internal quotation marks omitted). And the Court has repeatedly held that a critical part of an agreement to arbitrate that courts must enforce is the agreement to arbitrate bilaterally. *See Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309-2312 (2013); *AT & T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011).

Here, the Court must again consider whether a federal statute—the NLRA—may be reconciled with the unambiguous mandate of the FAA. Respondents nevertheless insist that this Court can sidestep its well-established path for reconciling competing statutes for three reasons. Each lacks merit.

*1. The FAA's saving clause cannot serve as an alternative to the congressional-command test*

Respondents first contend that the two statutes should be harmonized through the FAA's saving clause, not the congressional-command test. *E.g.*, Board Br. 37. But in case after case involving potential conflicts between the FAA and other federal statutes, this Court has *never* relied on the saving clause. Opening Br. 20. If the saving clause really were the appropriate means of reconciling the FAA with competing federal statutes, it would surely have featured prominently in the Court's prior decisions, and the Court would not have consistently demanded that the parties challenging arbitration provisions shoulder the "burden" of showing that the FAA's "mandate" had been "overridden by a contrary congressional command." *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 226-227 (1987); *see also CompuCredit*, 565 U.S. at 109 (Sotomayor, J., concurring in the judgment) (explaining that the "burden" made a difference in *CompuCredit*).

Respondents maintain that an arbitration provision that violates a federal statute is illegal, and that illegality is a ground preserved by the saving clause. *E.g.*, Board Br. 37, 45. Of course, the same could be said for every competing federal statute this Court has addressed via the congressional-command test. Indeed, *every* ground for challenging a contract could be said, at the most general level, to be a ground of "illegality." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 444 (2006). But the saving clause does not preserve *every* such ground. The Court so held in *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). That case involved an arbitration

provision that violated a state statute. *Id.* at 10. The dissent argued that the statute rendered the provision "void as a matter of public policy," *id.* at 20 (Stevens, J., concurring in part and dissenting in part)—which is to say, the provision's *illegality* under the state statute rendered it contrary to public policy. The Court nevertheless held that the statute fell beyond the limits of the saving clause because the statute was "not a ground that exists at law or in equity 'for the revocation of *any* contract.'" *Id.* at 16 n.11 (majority opinion).

*Southland* thus reinforces that Respondents' effort to invoke the saving clause is unavailing. Indeed, the NLRA lies beyond the limits of the saving clause for four independent reasons.

*First*, the FAA's saving clause saves only *inferior* laws, like state law or federal common law. *See NLRB* v. *Alt. Entm't, Inc.*, 858 F.3d 393, 418 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part). Respondents contend that there is no precedent supporting this view. Hobson Br. 40. But the relevant precedent is this Court's unbroken line of prior decisions involving the FAA and competing federal statutes, not one of which relies on the saving clause. Opening Br. 20.

Respondents invoke a New York Court of Appeals decision construing the New York arbitration statute on which the FAA was based. *E.g.*, Lewis Br. 43. In that decision, the court suggested that arbitration contracts "in *contravention* of a statute" would not be enforced. *Berkovitz* v. *Arbib & Houlberg, Inc.*, 130 N.E. 288, 290 (N.Y. 1921) (emphasis added). The court, however, never said that that was because of the statute's saving clause. And the words "in *con-*

*travention* of a statute" seem to capture well the "*contrary* congressional command" test. *McMahon*, 482 U.S. at 226 (emphasis added). *Berkovitz* is thus fully consistent with applying that test here.

*Second*, the saving clause applies only to grounds "'for the revocation of *any* contract,'" as *Southland* holds. 465 U.S. at 16 n.11. Respondents maintain that this requirement is satisfied so long as a ground does not "specifically *target*[] arbitration." Lewis Br. 38. The relevant passage in *Southland*, however, draws a different distinction: between grounds that apply to "*any* contract" and grounds that apply only to a particular *subset* of contracts—such as "contracts subject to the California Franchise Investment Law" (as was the case in *Southland*) or contracts subject to the NLRA (as is the case here). 465 U.S. at 16 n.11. Lower courts have read *Southland* in exactly this way. *See* Opening Br. 23 (citing cases).

According to Respondents, this reasoning would mean that the saving clause would fail to preserve the defense of incapacity. *E.g.*, Lewis Br. 39. That is mistaken. The incapacity defense does apply to *any* contract: If *any* contract on any subject is entered into by a party incapable of forming consent, that contract is revocable. By contrast, the NLRA, as construed by Respondents, would apply only to contracts *between employers and employees*: Only if an *employment* contract violates Sections 7 and 8 would that contract be illegal. The "any contract" requirement also explains why this Court has *never* relied on the saving clause in a case involving the FAA and another federal statute: In each of those prior cases, as here, the other federal statute applied only to a particular subset of contracts. Opening Br. 22.

*Third*, the saving clause does not preserve any ground that discriminates against arbitration by disfavoring contracts that have the "fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344; *see also Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1426 (2017). Respondents maintain that the NLRA is neutral with respect to arbitration, because "[a] contract forbidding joint action in court (without mentioning arbitration) would be equally invalid." Lewis Br. 37. But that was also true of the *Discover Bank* rule in *Concepcion*, 563 U.S. at 341, and the Court held that it did not make a difference: The rule still "interfere[d] with fundamental attributes of arbitration" by disfavoring agreements for bilateral arbitration that foreclosed the possibility of class arbitration. *Id.* at 344.

Respondents attempt to distinguish *Concepcion* on the ground that it involved a "*state* law [that] disfavored arbitration." Lewis Br. 40. That distinction fails. To begin, that attempted distinction of *Concepcion* is fundamentally inconsistent with Respondents' major premise that the saving clause either applies equally to state or federal law or actually incorporates the federal-law standard for illegality into state law. *Id.* at 36, 38; Hobson Br. 35 n.13, 40-41. If either proposition is true, then *Concepcion* cannot be dismissed as a case involving state law. Moreover, *Concepcion* construed the saving clause as inapplicable to laws that interfered with a fundamental attribute of arbitration. 563 U.S. at 343-344. That test turns not on the source of the law, but on its effect. Put differently, fundamental interference is fundamental interference, and nothing in *Concepcion* suggests a greater tolerance for fundamental inter-

ference from a federal law. Indeed, if even the presumption against preemption of state law is not enough to save the *Discover Bank* rule, *see Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992), there is no reason an NLRA-based rule should be treated more favorably.

*Fourth*, the saving clause applies only to grounds "for the *revocation* of any contract," 9 U.S.C. § 2 (emphasis added), which, as Justice Thomas has explained, means that the ground must challenge the "*formation* of the arbitration agreement," *Concepcion*, 563 U.S. at 353 (Thomas, J., concurring) (emphasis added). Lewis contends that the facts rendering the class waivers "illegal" existed "at or before the time of [the agreements'] making." Lewis Br. 42 (internal quotation marks omitted). But tellingly, Lewis stops short of saying that those facts pertained to "whether the [agreements were] *properly made*." *Concepcion*, 563 U.S. at 357 (Thomas, J., concurring) (emphasis added). Because they do not, the saving clause does not apply. For each of these reasons, the saving clause cannot serve as an alternative to the congressional-command test.

*2. Whether the class waivers violate the NLRA cannot be determined independently of the congressional-command test*

The Board also contends that "none" of the Court's prior "congressional-command cases involved an [arbitration] agreement that was illegal because it violated a federal statute." Board Br. 47. But that misunderstands the precedent. In *every* case, the plaintiffs *claimed* their arbitration agreements were illegal, invalid, and unenforceable because they violated a federal statute. This Court did not resolve

those claims by looking at the other federal statute in isolation, but instead rejected those claims after analyzing whether the competing statute in question contained a contrary congressional command and concluding that it did not. Opening Br. 14-18. Respondents' illegality distinction is thus no distinction at all. This Court's congressional-command analysis is precisely suited for claims that another federal statute, here the NLRA, renders the arbitration agreement illegal.

*3. There is no substantive-rights exception to the congressional-command test*

Respondents also contend that the congressional-command test "does not apply in cases involving prospective waivers of *substantive*, statutory rights." Hobson Br. 49 (emphasis added). Again, that misunderstands the precedent (and the NLRA for that matter). In *every* case involving the FAA and a competing federal statute, the Court asks whether there is a contrary congressional command in the other statute. In answering that question, the substance/procedure dichotomy is not determinative. While this Court has sometimes alluded to the distinction, it has done so only to emphasize that a statute does not contain a congressional command against arbitration merely because the statute's substantive rights may be vindicated through particular judicial procedures.

*Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), is illustrative. In that case, the plaintiff alleged that an arbitration agreement abridged his substantive rights by foreclosing particular procedural avenues for vindicating those rights. *Id.* at 27-28, 30-32. The Court held that Congress's articula-

tion of a judicial means of pursuing substantive rights in the Age Discrimination in Employment Act (ADEA) should not be viewed as a congressional command barring arbitration. *Id.* at 29. Therefore, *Gilmer* represents an application of the congressional-command test even in the face of an allegation that arbitration would abridge plaintiffs' substantive rights.*

*Italian Colors* makes the point even more clearly. That case involved the same type of arbitration provision as here: a "waiver of class arbitration." 133 S. Ct. at 2309. The plaintiffs alleged that the waivers impeded their *substantive* rights under the antitrust laws by barring the class procedures necessary to vindicate those statutory rights. *Id.* The Court nonetheless asked whether "the FAA's mandate ha[d] been overridden by a contrary congressional command"—the precise question it should ask here. *Id.* (internal quotation marks omitted).

Respondents nevertheless insist that there must be a substantive-rights exception to prevent arbitration provisions that discriminate on the basis of race, sex, or age. *E.g.*, Lewis Br. 54. Such provisions, though, would plainly violate the clear congressional commands embodied in Title VII and the ADEA, which prohibit such discrimination in no uncertain terms.

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* It is telling, moreover, that even though *Gilmer* considered the employment context and the ADEA referenced collective proceedings (a point the Court discussed at length), no one thought the NLRA or Section 7 even relevant to the discussion. Not even the AFL-CIO, which filed an amicus brief to raise a different issue outside the question presented (namely, the question later resolved in favor of arbitration in *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001)), thought Section 7 of the NLRA merited a mention.

29 U.S.C. § 623(a); 42 U.S.C. § 2000e-2(a). Those statutes' unambiguous commands would "overrid[e]" the FAA's mandate, rendering the discriminatory provisions unenforceable. *CompuCredit*, 565 U.S. at 98 (internal quotation marks omitted). There is no need to create an exception to the congressional-command test to preclude a parade of horribles that the test already forecloses. The difference here is that while Title VII and the ADEA contain unambiguous provisions barring discrimination based on race, sex, and age, the NLRA contains no unambiguous provision barring class waivers.

In any event, not only is Respondents' insistence on an exception to the congressional-command test mistaken, but it also does not help them. At the very most, the arbitration agreements here foreclose one procedural mechanism of pursuing the statutory right to "concerted activities," and *Gilmer* and *Italian Colors* make clear that is not enough to render the arbitration agreements invalid. *See Italian Colors*, 133 S. Ct. at 2309-2312; *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980) (the right to class proceedings is "a procedural right only"); Opening Br. 40-41, 47.

In sum, the FAA unambiguously mandates enforcement of the class waivers, and the relevant question—as in the many similar cases this Court has decided—is whether the other statute contains a contrary congressional command, foreclosing the possibility of harmonization.

### B. The NLRA Lacks A Contrary Congressional Command

The NLRA lacks a "clearly expressed congressional intention" to preclude enforcement of the class

waivers here. *Morton*, 417 U.S. at 551. Respondents assert that such a contrary congressional command can be found in Sections 7 and 8(a)(1). They suggest that Section 7 creates a semi-unwaivable, semi-substantive right to engage in every form of "concerted activity," including joint legal proceedings. And they claim that Section 8(a)(1) bars an employer from some, but not all, efforts to restrict employees from exercising those Section 7 rights. *E.g.*, Board Br. 12-20.

It is doubtful that the statute can reasonably bear such a broad and unusual understanding of the rights it confers, but the Court need not definitively decide *that* question. Respondents' understanding certainly is not "clearly expressed," *Morton*, 417 U.S. at 551, and that alone is enough to require that the class waivers be enforced.

*1. Section 7 does not clearly create a right to participate in joint legal proceedings*

Respondents assert that Section 7 gives employees a right to "collective litigation of legal claims." Board Br. 7. But Respondents cannot point to any "clearly expressed congressional intention" to confer such a right. *Morton*, 417 U.S. at 551. The NLRA makes no mention of joint legal proceedings, and was enacted years before Federal Rule of Civil Procedure 23 and the Fair Labor Standards Act, at a time when "individual" litigation (and bilateral arbitration) was the "usual rule." *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks omitted). Confronting a nearly identical situation in *Italian Colors*, this Court held that the federal antitrust statutes contained "[n]o contrary congressional command re-

quir[ing] [the Court] to reject [a] waiver of class arbitration." *Id.*

a. Respondents have little to say about that holding in *Italian Colors*. They instead begin their analysis by relying on *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978), for the proposition that "concerted activities" must include joint legal proceedings. In *Eastex*, this Court acknowledged the existence of Board and lower-court precedent in which employees engaged in "mutual aid or protection" under Section 7 through "resort to administrative and judicial forums." *Id.* at 565-566. A line from a judicial opinion, however, cannot substitute for the "clearly expressed congressional intention" necessary to override the FAA's mandate. *Morton*, 417 U.S. at 551. And this line would make a particularly poor substitute, given that it makes no explicit reference to arbitration and is accompanied by a footnote expressly declining to decide "what may constitute 'concerted' activities in this context." *Eastex*, 437 U.S. at 566 n.15. Thus, as the Board, Lewis, and Hobson must ultimately acknowledge, the meaning of "concerted activities" was not even at issue in *Eastex*. Board Br. 14 & n.2; Lewis Br. 10 & n.1; Hobson Br. 18.

In any event, even if *Eastex* could be read to suggest that "resort to" a judicial forum could involve "concerted activities," there are any number of ways in which employees may act in concert in the course of litigation—from hiring a lawyer to pooling finances to deciding to initiate individual litigation simultaneously—that do not involve class proceedings. Opening Br. 37, 40.

b. The text and structure of the NLRA confirm that even if employees have some right to engage in

"concerted activities" in the judicial forum, it does not include the right to be treated as a class. The NLRA places no obligation on judges or arbitrators to process employees' claims jointly. That silence is telling because it sets the right Respondents claim apart from the enumerated rights within Section 7. Most of those rights are something that an employee can "just *do*," without the blessing of a third party, *Alt. Entm't*, 858 F.3d at 415 (Sutton, J., concurring in part and dissenting in part)—like "self-organiz[ing]" or "choosing" "representatives" for collective bargaining, 29 U.S.C. § 157. And, when the enumerated rights do require the participation of employers or a third party, the NLRA's other provisions set out the corresponding obligations for those parties. For example, Section 7 creates a right to collective bargaining, but Section 8(a)(5) mandates that employers come to the table. Opening Br. 35. And, as Lewis points out, Section 9 sets out what the Board must do in order to vindicate employees' Section 7 right to choose an exclusive bargaining representative. Lewis Br. 14-15.

Thus, under the canon of *ejusdem generis*, "other concerted activities" should be understood to encompass only those rights that employees can engage in unilaterally or with the participation of other parties that is mandated elsewhere in the Act. Opening Br. 33-34. Because the right to participate in class proceedings does not fit that description, it is not clearly included within Section 7.

c. Respondents attempt to evade this difficulty by asserting that the Section 7 right places no *new* obligations on judges or arbitrators because it entitles employees to participate in a class action only if a class action is otherwise permitted under Rule 23.

But that means that the breadth of an employee's substantive Section 7 rights expanded significantly upon the promulgation of Rule 23 and depends on the application of that Rule, a proposition that runs directly contrary to the Rules Enabling Act. The Act mandates that the Federal Rules shall not "abridge, enlarge or modify" substantive rights. 28 U.S.C. § 2072(b).

Respondents wave off that concern, noting that Rule 23's limitations on the right to engage in class proceedings are no different from the limitations placed on the right to strike by the number of accessible sidewalks. Hobson Br. 21 n.7. But there is no "Sidewalk Enabling Act" prohibiting the scope of substantive rights from turning on the availability of sidewalks. The Rules Enabling Act establishes just such a prohibition with respect to the Federal Rules.

To accommodate *that* awkwardness, respondents seek to redefine Section 7 to include the right to engage in concerted activities only *"if and as available."* Board Br. 19. But those words appear nowhere in the text of the NLRA, and Respondents' application of this added qualifier is haphazard. On the one hand, they claim that class proceedings are *available* to them despite the waivers they signed, despite the fact that the FAA mandates that arbitration agreements be honored, and despite the fact that Section 7 does not protect "concerted activities such as those that are * * * in breach of contract." *NLRB* v. *Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962). On the other hand, Respondents assert that Rule 23 permissibly renders some class proceedings *un*available, despite the Rules Enabling Act.

The distinction is hard to defend. It is far more natural to conclude that even if Section 7 protects employees working together in the judicial forum, it does not permit them to override a contractual waiver *or* the limits of Rule 23 in order to demand class or collective treatment from the judge or arbitrator.

d. Perhaps recognizing the impossibility of locating a contrary congressional command in the NLRA, Respondents invoke a predecessor statute, the Norris-LaGuardia Act (NLGA). But that Act actually undermines their novel reading of Section 7. Section 4 of the NLGA contains a list of concerted activities that the Act protects from being enjoined. 29 U.S.C. § 104. All of those activities are things that employees just *do*, including the one that Respondents focus on most: "aiding" someone "who is being proceeded against in, or is prosecuting, any action or suit in any court." *Id.* § 104(d). As the origins of that provision make clear, Congress had in mind activities like "sending money" to a litigant. Opening Br. 38-39.

Respondents find it "puzzling" that Congress would protect the right to send money but not the right to have their claims processed jointly. Lewis Br. 22 n.3. But again, the latter right is different from everything mentioned in the NLGA: It cannot be exercised without imposing new obligations on others. It would also interfere deeply in the judicial (and arbitral) process in a way that none of the self-executing rights in the NLGA does. Respondents' reliance on the NLGA—including as an independent ground for invalidating the class waivers—is therefore misplaced.

e. Finally, Respondents' attempt to find support in the NLRA's purposes also fails. *E.g.*, Board Br. 15-16. Those purposes do not support the anti-arbitration rule Respondents seek. As Respondents point out, one of the NLRA's key purposes was to ameliorate the "inequality of bargaining power between employees * * * and employers." 29 U.S.C. § 151. But the outcome in a courtroom (and in arbitration) is driven by the law and the neutral decisionmaker, not by the numbers on a particular side. Whether employees sue individually or as a class should not affect their "separate entitlements." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). Class proceedings thus are hardly necessary to further the purpose of bargaining equality.

*2. Section 8 does not prohibit employers from channeling concerted activities into particular procedural mechanisms*

Section 8 poses, if anything, an even greater challenge for Respondents. That provision broadly prohibits any employer effort to "interfere with or restrain" activities protected under Section 7. 29 U.S.C. § 158(a)(1). Thus, if Section 7 really created a substantive right to collective litigation, then it would seem that every employer's effort to resist certification or decertify a class once certified would constitute a Section 8 violation. But not even Respondents can embrace that absurd position, and so they are forced to defend a distinction between a prospective class waiver in an arbitration agreement (which they deem an unfair labor practice) and efforts to resist class certification (which they deem permissible, *e.g.*, Lewis Br. 53; Hobson Br. 22). And that is on top of the awkwardness of explaining

why—as this Court has held—Section 8 poses no obstacle to a standard arbitration agreement that necessarily waives *every* form of "concerted activity" within the judicial forum, *see* Opening Br. 41; Board Br. 9-10, 38; Lewis Br. 53; Hobson Br. 55, but—according to Respondents—blocks these class waivers. Respondents' position has no grounding in the unqualified text of Section 8.

Thus, having twisted the "concerted activities" of Section 7 to protect a right unlike any other, Respondents must twist Section 8 to permit some efforts to interfere with allegedly protected activities. The alternative of interpreting Section 7 to protect concerted activities that do not depend on the approval of a judge or arbitrator has much to recommend it. But at an absolute minimum, Respondents' distort-Section-7-then-distort-Section-8 construction is neither the only construction of the NLRA nor anything like the contrary congressional command required by this Court's cases.

*3. At a minimum, employees should be permitted to waive their supposed right to participate in joint legal proceedings*

Respondents do not merely argue that *employers* are barred from limiting access to class proceedings; they claim that *employees* are barred from waiving this supposed right through an individual contract. But as noted above, this Court has specifically stated that "[Section] 7 does not protect *** concerted activities such as those that are *** in breach of contract." *Wash. Aluminum*, 370 U.S. at 17. And Respondents concede that a contract may validly waive an employee's right to engage in all concerted activities within the judicial forum, if the employee

retains his right to arbitrate. Board Br. 9-10. Neither of these propositions could be true if employees are wholly precluded from entering contractual agreements to waive Section 7 rights. And indeed, they are not.

a. The proposition that individual class waivers are barred runs into its initial obstacle in the statutory text. Section 7 gives employees both the right to "engage" in concerted activities and to "refrain" from engaging in those activities. 29 U.S.C. § 157. Assuming class litigation is included within the former right, barring employees from waiving the right to class proceedings runs contrary to the latter right. Respondents' only answer is that the right to refrain must be exercised on a case-by-case basis "at the appropriate time," and may not be formalized as a contractual promise. Board Br. 28-29. But that strips employees who wish to refrain from certain concerted activities of any benefit they might obtain from their willingness to collectively refrain. Only if an employee is able to contract away that right up front when other benefits are up for discussion may she use it as a bargaining chip to obtain other benefits she values. Nothing in Section 7 or the NLRA as a whole provides an excuse for depriving employees of that benefit.

Moreover, Respondents readily acknowledge that a union representative may waive an employee's supposed right to joint legal proceedings through a collective-bargaining agreement. Respondents' argument is only that an employee may not waive the right on her own behalf in an individual contract. Aside from the basic inequity of holding that an employee may not waive for herself what her union may waive for her, this position runs contrary to

clear precedent holding that—in the absence of a union—employees are free to enter into individual contracts that cover the same material as collective-bargaining agreements. *See J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 336 (1944) ("Care has been taken * * * to reserve a field for * * * a *completely individually bargained contract* setting out terms of employment * * * ." (emphasis added)). And this Court has recently been even more explicit with respect to arbitration agreements, stating that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 258 (2009).

b. Nonetheless, Respondents contend that *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), and *J.I. Case* preclude any individual waivers of Section 7 rights. But those cases stand for much narrower propositions. *National Licorice* holds only that an employer may not use unlawful labor practices to pressure its employees into signing individual contracts that release their right to engage in collective bargaining. *Id.* at 360. *J.I. Case* holds that independent contracts entered into before employees have unionized may not be used to preclude collective bargaining if and when a union is formed. 321 U.S. at 337. Those holdings are part of the lengthy tradition—codified in the NLGA—barring "yellow dog" contracts, individual agreements in which employees surrender their rights to unionize or bargain collectively. *See* 29 U.S.C. § 103.

That rule makes sense: An employee who enters an individual contract and later comes to believe that

her employment has been conditioned on unfair terms may join forces with her colleagues in a union that can use its collective-bargaining power to negotiate more equitable terms. That solution would be out of reach if an employer could use individual contracts to impede collective bargaining. But the same concerns do not apply with respect to individual contracts that waive joint legal action. If the employee comes to believe that the individual waiver was inequitable, she may unionize and bargain for a new contract that does not include such a waiver. Simply put, being party to an arbitration agreement that precludes class arbitration does not meaningfully prevent an employee from unionizing. While honoring such an agreement lies at the core of the FAA, permitting such an agreement poses no material risk to the concerns at heart of the NLRA. Indeed, Respondents' effort to paint a standard agreement for bilateral arbitration as a modern-day yellow-dog contract evinces the very hostility to arbitration the FAA is designed to counteract.

*4. The Board is not entitled to deference*

Unable to ground many of their arguments in the text of the statute or the precedent of this Court, Respondents repeatedly rely on the holdings of the Board. *E.g.*, Board Br. 15, 23. But the Board itself does not even claim *Chevron* deference in this case. *See Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

For good reason. Notions of deference are misplaced when this Court needs to resolve the competing demands of two statutes, only one of which is interpreted by the Board. Opening Br. 50-53. It is thus doubtful that a regulatory interpretation could

ever supply the kind of contrary *congressional* command this Court's cases demand. But a long-standing, well-reasoned position might at least have a chance. Here, the Board's position is neither. It reflects a recent about-face and involves a novel effort to divine a prohibition on class waivers in statutory provisions that do not so much as mention arbitration.

Moreover, *Chevron* deference is rooted largely in the need to defer to the politically accountable Executive Branch. *See* 467 U.S. at 865-866. But in this case, the Board is an independent agency, and the politically accountable Executive Branch has come out *against* the Board's interpretation. U.S. Br. 13. In such circumstances, *Chevron* deference is inappropriate.

* * *

There is another way. Section 7's right to engage in "concerted activities" includes activities that an employee may engage in on her own, or with the support of employers and third parties as explicitly mandated in the Act. The right to participate in collective or class legal proceedings does not fit that bill. And even if it did, nothing in the NLRA precludes employers from channeling concerted activities into a particular procedural form, or individual employees from waiving class proceedings through an arbitration agreement. In short, the NLRA contains no congressional command contrary to class waivers, and it can—and should—be reasonably construed in harmony with the FAA's mandate that such waivers be enforced.

## II. IF THE FAA AND THE NLRA CANNOT BE HARMONIZED, THE FAA SHOULD BE GIVEN PRIORITY

If the NLRA did contain a contrary congressional command, the Court would still have to confront the question of which statute should be given priority. Respondents contend that the NLRA should take precedence because it was enacted later in time. *E.g.*, Lewis Br. 51-52. But "a specific statute will not be controlled or nullified by a general one, *regardless of the priority of enactment*." *Morton*, 417 U.S. at 550-551 (emphasis added). And because the FAA is the more specific of the two statutes, it should govern here. Opening Br. 54-56. Moreover, giving priority to the FAA would impair the NLRA only peripherally, while giving priority to the NLRA would undermine the FAA at its core. *Id.* at 56-57. Thus, even if the two statutes cannot be reconciled, the class waivers should be enforced.

## CONCLUSION

The judgment of the Fifth Circuit in *Murphy Oil* should be affirmed, and the judgment of the Seventh Circuit in *Epic* should be reversed.

Respectfully submitted,

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